UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-v-

RAJAT K. GUPTA and RAJ RAJARATNAM,

Defendants.

11 Civ. 7566 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Pending before the Court in the above-captioned case is the motion of plaintiff Securities and Exchange Commission ("SEC") for summary judgment against defendant Rajat K. Gupta.[1] The SEC's Complaint against Gupta alleges that various of Gupta's tips of material nonpublic information to Raj Rajaratnam violated section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, 15 U.S.C. §78j(b) and 17 C.F.R. §240.10b-5, as well as section 17(a) of the Securities Act, 15 U.S.C. §77q(a). The parties have stipulated that Gupta's criminal conviction of counts three, four, and five of Superseding Indictment No. S1 11 Cr. 907(JSR) collaterally estops Gupta from contesting his liability for the essentially identical conduct and charges alleged in the instant complaint. See Def.'s Mem. in Opp. to Summ. J. at 1 n.1; see also United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978) ("It is

[1] The Court issued a final consent judgment as to co-defendant Raj Rajaratnam on December 26, 2012. See ECF No. 59.

well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel . . . in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case."). Consequently, summary judgment is hereby granted in favor of plaintiff as to defendant Gupta's liability, and it remains only to determine the proper relief.

The SEC seeks a maximum civil penalty of $15,321,195 (which is treble the SEC's calculation of the sum of the gains gained and losses avoided by Gupta's tippees' use of inside information in their trading); a permanent injunction enjoining Gupta from future violations of the federal securities laws; an order barring him from serving as a director or officer of a public company; and an additional bar prohibiting his association with brokers, dealers, or investment advisors.[2] The Court discusses each in turn.

Section 21A of the Securities Exchange Act of 1934 authorizes district courts to impose a civil penalty upon any person who commits insider trading. See 15 U.S.C. § 78u-1. The Act directs that the appropriate amount of the civil penalty is to be determined by the Court "in light of the facts and circumstances," but is not to exceed "three times the profit gained or loss avoided." 15 U.S.C. § 78u-1(a)(2). The statute is designed both to "punish the individual

[2] In its reply brief, the SEC withdrew its other requests, for disgorgement and prejudgment interest. See Pl.'s Reply Mem. at 1 n.1.

violator and deter future violations of the securities laws." SEC v. Haligiannis, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007).

In determining the appropriate amount of a civil penalty courts in this District are typically guided by the factors set forth in Haligiannis, to wit: "(1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition." Id. at 386. See also SEC v. Rajaratnam, 822 F. Supp. 2d 432, 433 (S.D.N.Y. 2011).

The Court is in agreement with the SEC that all of the Haligiannis factors counsel in favor of imposing the maximum allowable civil penalty upon Gupta. As this Court had occasion to note in sentencing Gupta for this misconduct, Gupta was guilty of an "egregious breach of trust" involving multiple material disclosures of inside information. See United States v. Gupta, 904 F.Supp.2d 349, 352-54 (2012). His conduct was knowing, willful, purposeful, and recurrent, and resulted, in effect, in millions of dollars of losses to those who traded their stock without the benefit of Gupta's inside information, see id. at 352-53. Finally, based on information provided to the Court in connection with Gupta's sentencing, the Court concludes that Gupta's current financial condition does not counsel against the imposition of a civil penalty of the level that the SEC seeks.

While Gupta argues that a treble penalty is inappropriate in light of the criminal penalties already imposed, imposition of an additional civil penalty is called for here in order to effectuate Congress's purpose of making insider trading a money-losing proposition, both for Mr. Gupta and for those who would consider it.[3] See SEC v. Rajaratnam, 822 F. Supp. 2d at 434.

The Court's conclusion that a substantial penalty is appropriate in this case does not, however, end the enquiry. For although, as noted above, the Court has already found, in effect, that Gupta's misconduct caused substantial losses, the trebling must be multiplied against a specific base figure, defined by section

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[3] Equally unavailing is Gupta's argument that the SEC inferentially "concluded that a treble civil penalty was not warranted or in the public interest," see Def.'s Mem. in Opp. to Summ. J. at 2, because the Commission initially authorized an administrative proceeding against Gupta, in which the maximum "Third Tier" monetary penalty would be less than the civil relief available to this Court. The relatively limited relief that would have been available to the SEC had this action proceeded in administrative forum is a matter of complete irrelevance to this Court, bound as it is to apply its statutory mandate under 15 U.S.C. § 78u-1. Furthermore, Gupta is hardly in a position to complain of the consequences of moving this action from an administrative to a judicial forum, since he is the one who effectively sought this change. See Gupta v. SEC, 796 F. Supp. 2d 503 (S.D.N.Y. 2011).

78u-1 of the Exchange Act as the "profit gained or loss avoided."[4] Moreover, on a summary judgment motion, this amount must be based solely on calculations as to which the issue-preclusion of Gupta's criminal conviction applies.

In this regard, the three substantive counts of insider trading of which Gupta was convicted relate to Rajaratnam's purchases of approximately 217,200 shares of Goldman Sachs securities on September 23, 2008 (Counts 3-4) and the sale of approximately 150,000 shares of Goldman Sachs on October 24, 2008 (Count 5). See Superseding Indictment 20-22, No. 11 Cr. 907 (JSR), ECF No. 25. The SEC's complaint alleges, in pertinent part, the same unlawful trades, in the same quantities, on the same dates. See Compl. ¶¶ 21, 27. The parties agree that the gains made and losses avoided by these trades total $4,641,555, which, when trebled, amounts to $13,924,665. See Pl.'s Statement of Undisputed Material Facts ¶ 14; Def.'s Counterstatement of Undisputed Material Facts ¶ 2. While the SEC argues for the inclusion of still other losses and gains, the Court finds that none of them was so firmly established in the criminal case as to qualify for collateral estoppel, and that, in any event, the Court would not choose to exercise its

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[4] The Court has already rejected Gupta's argument that only Gupta's personal profits can be used in making this calculation, as opposed to his tippees' profits. SEC v. Rajaratnam, 822 F. Supp. 2d at 435.

discretion to include these more problematic figures. Accordingly, the Court imposes a civil monetary penalty of $13,924,665.

Turning to injunctive relief, a Court, upon finding that a violation of the securities laws has occurred, may impose permanent injunctive relief once it is satisfied that there is a substantial likelihood of future violations of the securities laws. See 15 U.S.C. § 78u(d); SEC v. Commonwealth Chem. Secs., Inc., 574 F.2d 90, 99 (2d Cir. 1978). See also SEC v. Cavanagh, 155 F.3d 129, 135 (2d Cir. 1998). The Court's assessment of the reasonable likelihood of recurrence is aided by a number of factors: 1) the fact of the defendant's liability for past illegal conduct; 2) the degree of scienter involved; 3) whether the misconduct was an "isolated occurrence;" 4) whether the defendant continues to maintain that his past conduct was blameless; and 5) "whether, because of his professional occupation, the defendant might be in a position where future violations could be anticipated." Cavanagh, 155 F.3d at 135.

As part of its imposition of a civil penalty on the basis of claim preclusion, the Court has already found that the first through third factors weigh in favor of imposing injunctive relief. Turning to the fourth, the Court declines to attach any significance, one way or the other, to Mr. Gupta's decision to vigorously contest his criminal liability and to pursue appeals of both his conviction and sentence. However, the fifth factor clearly weighs in favor of injunctive relief. Gupta's rise to the pinnacle of his profession as the head of the worldwide consulting firm McKinsey & Co., and, indeed, his nearly unparalleled level of access to upper echelons of corporate executives throughout the world creates the risk that, notwithstanding his fall from grace, Gupta remains well-placed to repeat his misconduct in the future. In sum, since all but one of the relevant factors weigh in favor of permanent injunctive relief, the Court hereby permanently enjoins Gupta from further violations of the securities laws.

Finally, the SEC seeks a judgment imposing permanent bars on Gupta that would prohibit both his service as a director or officer of a public company and his association with brokers, dealers, or investment advisors. The former bar is expressly within the Court's remedial authority under the Exchange Act and Securities Act. See 15 U.S.C. §§ 77t(e) & 78u(d)(2). While the latter bar is not specifically mentioned in either statute, Section 21(d)(5) of the Exchange Act recognizes the Court's power to grant "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. §78u(d)(5). And while such associational bars are usually imposed in an administrative proceeding within the Commission, the Court perceives no reason why sanctions typically imposed within an administrative context cannot also be imposed pursuant to the Court's equitable authority.

Turning to the merits, the statutory warrant for a director-officer bar only requires, in pertinent part, a finding that the defendant's conduct demonstrates "unfitness to serve as an officer or director." See 15 U.S.C. §§ 77t(e) & 78u(d)(2). That language lessens the requirement that preceded the Sarbanes-Oxley amendments, which required a showing that the person against whom the bar was sought was "substantially unfit" to serve as a director or officer. This amendment "demonstrates that Congress's intent was to lower the threshold of misconduct for which courts may impose director and officer bans." SEC v. Bankosky, --- F.3d ---, 2013 WL 1955809, at *3 (2d Cir. May 14, 2013).

Despite this lower standard, courts in this Circuit have typically applied a pre-Sarbanes-Oxley list of six non-exhaustive factors to aid their determination of the propriety of an officer-director bar: (1) the egregiousness of the underlying securities law violation; (2) the defendant's recidivism; (3) the defendant's role or position in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur. See SEC v. Patel, 61 F.3d 137, 141 (2d Cir.1995); see also Bankosky, 2013 WL 1955809, at *3 (noting the continued utility of the Patel indicators as a "non-exclusive" list of factors that should inform a finding of unfitness). Here, notwithstanding the fact that the criminal conviction of insider trading that forms the basis of Gupta's civil liability is his first conviction, and notwithstanding the fact that Gupta's long-term pecuniary gain from the insider trading conspiracy was speculative, the Court has no trouble concluding on the strength of the remaining Patel indicators that Gupta is permanently unfit to serve as an officer or director of any public company.

To begin with, as the jury found, Gupta engaged in insider trading knowingly, willfully, and with intent to defraud. Moreover, the Court has already determined in enjoining Gupta from future violations of the securities laws that there is a likelihood that Gupta's misconduct would recur absent appropriate constraints. Most important, however, the Court has no difficulty in concluding that Gupta's conduct "betray[ed] an impulse to place self-interest ahead of his employer's and its shareholders' interests and further demonstrates unfitness to serve as a corporate fiduciary." Bankosky, 2013 WL 1955809, at *4. Indeed, it was precisely the privileged access to information given to Goldman Sachs directors that permitted Gupta to disclose market-moving non-public information to Rajaratnam. Consequently the Court permanently enjoins Gupta from serving as an officer or director of any publicly traded company.

Many of the same factors described above also support an associational bar. See generally Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979); Kornman v. SEC, 592 F.3d 173 (D.C. Cir. 2010) (upholding a permanent associational bar upon review of the agency's application of the Steadman factors and the agency's determination that the bar would be in the public interest). Specifically, for the same reasons that support the imposition of a director-officer bar against Gupta, whether denominated as "Patel" or "Steadman" factors, as well as the considerations of general deterrence that animated, in part, the Court's imposition of an incarcerative sentence in the criminal case, see Gupta, 904 F.Supp.2d at 355 (noting the special need for general deterrence in insider trading cases) and Steadman, 603 F.2d at 1140 (noting the propriety of deterrence as a reason for permanent debarment), the Court finds that a permanent associational bar is both necessary and in the public interest.

For the foregoing reasons, the Court hereby grants the SEC's motion for summary judgment, and imposes a civil penalty of $13,924,665, a permanent injunction prohibiting Gupta's service as an officer or director of a public company, and a permanent injunction prohibiting Gupta's association with brokers, dealers, or investment advisors. The Clerk of the Court is to enter final judgment.

SO ORDERED.

Dated: New York, NY
July 17, 2013

JED S. RAKOFF, U.S.D.J.